

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

Karen A. Overstreet
Bankruptcy Judge

CHAMBERS
United States Courthouse
700 Stewart St., Rm. 7216
(206) 370-5330
Facsimile (206) 370-5335

March 1, 2005

Mr. Larry Spokoiny
4306 245th Ave. SE
Issaquah, WA 98029

Mr. Michael P. Klein
1809 Seattle Tower
1218 - 3rd Ave.
Seattle, WA 98101

Re: *In re Larry & Elizabeth Spokoiny*, Case No. 02-24138

Dear Counsel:

At the hearing on February 2, 2005, I took under advisement the issue of whether the Washington State Youth Soccer Association ("WSYSA") needed to obtain relief from the automatic stay to enforce its post confirmation judgment against the debtors. As discussed below, I conclude that WSYSA may continue to defend its judgment against the debtors on appeal, and in addition, in the absence of a stay pending appeal, WSYSA may enforce its judgment against the debtors and their property.

The parties stipulated that the facts and circumstances giving rise to WSYSA's judgment at issue arose postpetition but pre confirmation; however, the actual judgment was entered post confirmation. The Spokoins filed their Chapter 13 petition on November 20, 2002 and an order confirming their Third Amended Chapter 13 Plan (the "Plan") was entered on January 15, 2004 (the "Confirmation Order"). The incident giving rise to Mr. Spokoiny's suspension by WSYSA occurred at a soccer game on August 31, 2003. Mr. Spokoiny filed a lawsuit in King County Superior Court on January 23, 2004, seeking to enjoin WSYSA from

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enforcing its suspension decision. On May 17, 2004, the state court lawsuit was dismissed with prejudice on summary judgment. The state court awarded attorneys fees and administrative fees to WSYSA on June 14, 2004 and the award, in the amount of \$16,353.83, was reduced to judgment on July 7, 2004 (the "Judgment"). Mr. Spokoiny has appealed the Judgment, but has not posted a supercedeas bond.

Paragraph 7 of the Plan states that "Property of the estate shall revert in the Debtors upon confirmation of the Plan." The Confirmation Order includes the following provisions:

3. That the debtor(s) shall incur no additional debt except after obtaining prior Court permission; ...

6. That during the pendency of the plan hereby confirmed, all property of the estate, as defined by 11 U.S.C. section 1306(a), shall remain vested in the debtor(s), under the exclusive jurisdiction of the Court, and further, that the debtor(s) shall not, without specific approval of the Court, lease, sell, transfer, encumber or otherwise dispose of such property;

7. That all projected disposable income received by the debtor(s) beginning on the date the first payment is due under the plan shall be applied as payments under the plan pursuant to 11 U.S.C. section 1325(b)(1)(B), unless the Court orders otherwise.

The Plan is a 60-month, 100% plan.

The automatic stay prohibits certain actions against the debtor, the property of the debtor, and property of the estate. *In re Johnson*, 51 B.R. 439, 442 (Bankr. E. D. Pa. 1985), citing *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (9th Cir. BAP 1982). Because the Judgment is a postpetition obligation, the stay provisions in § 362(a)(1) are not applicable. Similarly, property of the debtor is protected only if the acts are to collect on a prepetition debt. 11 U.S.C. § 362(a)(5). Further complicating the analysis are § 362(c)(1), which provides that the stay of an action against property of the estate terminates when the property is no longer property of the estate, and § 362(c)(2), which provides that the stay as to any other action expires the earlier of the time the case is closed, dismissed, or the time the debtor receives a discharge. Accordingly, the issue here is the scope of the automatic stay as it applies to property of the estate. Or, more directly, what constitutes property of the estate after confirmation in a Chapter 13?

The question of the effect of plan confirmation on postpetition claims raises several issues that are unresolved in this circuit and elsewhere. The Code itself creates a tension between the language of § 1327(b), stating that one of the effects of confirmation is to vest all of the property of the estate in the debtor, and § 1306, which provides that property of the estate includes all property acquired postpetition until the case is closed, dismissed or converted. The Ninth Circuit Court of Appeals has not addressed this issue. Courts that have addressed the issue are split into four camps. See *Chapter 13 Bankruptcy*, Keith Lundin § 230.1 (3rd Edition 2004).¹ See, also, *In re Petruccelli*, 113 B.R. 5 (Bankr. S.D. Cal. 1990) (providing a good overview of the existing case law). The most pervasive view is that post confirmation all property of the estate becomes property of the debtor except property that is essential to the debtor's performance of the plan. See, e.g., *In re Leavell*, 190 B.R. 536 (Bankr. E.D. Va. 1995); *In re Root*, 61 B.R. 984 (Bankr. D. Colo. 1986); *In re Johnson*, 36 B.R. 958 (Bankr. D. Utah 1983); *In re Adams*, 12 B.R. 540 (Bankr. D. Utah 1981). Taking an even more expansive view, the court in *In re Reynard*, 250 B.R. 241 (E.D. Virginia 2000), held that all post confirmation earnings, not just those necessary for plan payments, are part of the post confirmation Chapter 13 estate and are protected by the stay. The Court in *Reynard* reasoned that to conclude otherwise would necessarily undermine the debtors's ability to successfully complete the Chapter 13 plan by subjecting the debtor's living expenses and entire disposable net income to the reach of postpetition creditors. *Reynard*, 250 B.R. at 248-249.

On the other extreme is *In re O'Brien*, 181 B.R. 71,74 (Bankr. D. Ariz. 1995), in which the court held that the term "vests", as used in the context of § 1327(b), means that the bankruptcy estate ceases to exist and that the debtor has the

¹ The four views are: (a) at confirmation, the estate is no longer and all property of the estate becomes property of the debtor; (b) at confirmation, all property of the estate becomes property of the debtor except property essential to the debtor's performance of the plan - the estate continues but contains only property necessary to complete the plan; (c) all property of the estate becomes property of the debtor, the estate continues and consists of all property acquired by the debtor after confirmation; and (d) the existence of the estate does not change as a result of confirmation - the vesting under § 1327(b) does not remove property from the estate. Lundin, § 230.1.

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sole ownership, control and enjoyment of the property.² The corollary is then also true: postpetition creditors are free to collect from the debtor as if no bankruptcy existed. See *In re Mason*, 45 B.R. 498 (Bankr. D. Or. 1984), *aff'd*, 51 B.R. 548 (D. Or. 1985); *In re Walker*, 84 B.R. 888 (Bankr. D.D.C. 1988). In *In re Frausto*, 259 B.R. 201, 216-217 (Bankr. N.D. Ala. 2000), the court was adamant that postpetition creditors who are not required to participate in the plan and who will receive nothing thereunder are not bound by any Code section from pursuing their rights in property that vests in the debtor post confirmation.

Although the Ninth Circuit has not ruled on the issue of collection of a post confirmation debt in a Chapter 13, there is dicta suggesting that the Circuit would place a heavy emphasis on the language of the confirmed plan and the confirmation order. For example, in *Nash v. Kester (In re Nash)*, 765 F.2d 1410 (9th Cir. 1985), the court construed the revesting language of both § 1327(b) and § 349(b)(3) to give the debtors, rather than the Chapter 13 trustee, ownership of earnings received by the debtors after confirmation of their plan, but before dismissal of their case. The court concluded that revesting was complete in the debtors after confirmation, notwithstanding that the earnings were "submitted to the 'supervision and control' of the Trustee." *Id.* at 1414, *citing* 11 U.S.C. § 1322(a)(1).

In another Ninth Circuit case, *Hillis Motors, Inc. v. Hawaii Auto Dealers' Ass'n*, 997 F.2d 581, fn. 10 (9th Cir. 1993), the court again analyzed the effect of revesting, this time in the context of a Chapter 11 proceeding. The court held that the effect of the property revesting in the debtor pursuant to § 1141(b) was "explicitly subject to the provisions of the plan." *Id.* at 587. The language of the confirmed plan in *Hillis* was not clear as to whether the property was to revest in the debtor upon confirmation. Aspects of the plan placed significant restrictions on the debtor's ability to use and control the property and the plan delayed the debtor's discharge until future events had occurred.

The foregoing Ninth Circuit cases suggest that this Court should be guided primarily by the language of the Plan and the Confirmation Order. Neither document, however, is a model of clarity. The Confirmation Order, paragraph 6, states that the

² The *O'Brien* court reasoned that because § 1306(b) already gives the debtor possession of all property of the estate, the term "vests" must mean something additional.

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property of the estate, while "vested" in the debtor, is under the exclusive jurisdiction of the Court and cannot be sold or transferred without specific Court approval. The Plan states unequivocally that all "property of the estate shall revert in the debtors upon confirmation." Plan, para. 7. The Confirmation Order prohibits the debtor from incurring any additional debt post confirmation except upon permission of the Court. Neither the Plan nor the Confirmation Order specifically addresses the rights of postpetition creditors.

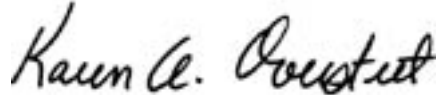
I conclude that, based upon the cited provisions of the Plan and Confirmation Order, property of the estate vested in the debtors as of the date of confirmation. After that point in time, the property was no longer protected from post confirmation creditors by the automatic stay or any other provision of the Bankruptcy Code. The court in *Hillis* noted that the retention of jurisdiction by the bankruptcy court does not *per se* continue the effect of the automatic stay. *Hillis*, 997 F.2d 587, fn 11. If the Spokoinys' property continued to be property of the estate after confirmation, then there would be no need for restrictions on their ability to transfer that property. Similarly, if the debtors meant to protect so much of their property and earnings as necessary to complete the term of the plan, they could have so provided in their Plan. In that sense, I agree with the statement of the court in *In re Petruccelli*, 113 B.R. 5, 17 (Bankr. S.D. Cal. 1990) that "if the debtor wishes to ensure that the property is secure from post-petition creditors, the debtor may propose to delay revesting."

Unless otherwise provided in a confirmed Chapter 13 plan, property of the estate vests in the debtor upon confirmation and the debtor reenters the financial world without the protection of the bankruptcy court and code. There are many events outside the control of the court that prevent debtors from completing performance of their confirmed plans, including job loss, unanticipated illness or disability. If the Spokoinys are not able to complete their plan, it will be as a result of their own actions post confirmation. In this case, Mr. Spokoiny violated that provision of the Plan that prohibits the incurrence of additional debt without court approval. I cannot protect the Spokoinys from the consequences of their postpetition actions at the expense of a creditor with no knowledge of the bankruptcy proceeding, no right to participate in the confirmation process, and no expectation of any payment from the plan payments.

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Accordingly, I conclude that the debtors and their property are not protected by the automatic stay and WSYSA is free to pursue its rights and remedies under state law. I would request that Mr. Klein prepare an order on this ruling and note the proposed order for hearing.

Very truly yours,

A handwritten signature in black ink, appearing to read "Karen A. Overstreet". The signature is written in a cursive, flowing style.

Karen A. Overstreet
United States Bankruptcy Judge

cc: Mr. K. Michael Fitzgerald (via ECF)

1 KAREN A. OVERSTREET
2 Bankruptcy Judge
3 315 Park Place Bldg.
4 Seattle, WA 98101
5 (206) 553-1624

6 UNITED STATES BANKRUPTCY COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 In re:)
10) Chapter 13
11 SPOKOINY, Larry & Elizabeth,)
12) Bankruptcy No. 02-24138
13)
14 Debtor.)
15) DECLARATION OF MAILING
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I certify that I sent a copy of Letter to Counsel dated
March 1, 2005 by first class mail, postage prepaid, to the
following individuals on March 1, 2005.

Larry and Elizabeth Spokoiny
4306 245th Avenue S.E.
Issaquah, WA 98029

Mr. Michael P. Klein
1809 Seattle Tower
1218 - 3rd Avenue
Seattle, WA 98101

/s/

Duffy Clarke, Judicial Assistant